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Supreme Court, U.S.
FILED

99 533 SEP 21 1999

No. _____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

HOBERT PARKER, Jr., Petitioner

VS.

UNITED STATES AIR FORCE AND
UNITED STATES OF AMERICA, Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24pp

IV

QUESTIONS PRESENTED

1. Whether Due Process is constitutionally required after the issuance of a barment order from a military installation which contains "regular allegations", punishable by imprisonment, which impose a badge of infamy on the accused person.

2. Whether the First Amendment protects speech during a private telephone conversation that was not perceived as threatening by the sole-direct witness.

3. Whether barment orders from military installations are required to comply with:

A--18 U.S.C., Section 1001 (prohibits false official statements).

B--Applicable military regulations (e.g. Air Force Instruction 31-209, chap. 2, para. 2.8, "Barment orders should be in writing and contain sufficient details to support prosecution by civilian authorities.")

C--The Administrative Procedures Act, 5 U.S.C., Sections 700-706 (agency action must be based on facts or substantial evidence).

4. Whether the Court will require that the actions and statements of military authorities before the issuance of a barment order--and any EXCEPTION within the barment order itself--are to be consistent with their allegation within a barment order that the accused person is considered to be a threat to the maintenance of good order and discipline on a military installation.

V

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below from the Ninth Circuit Court of Appeals.

IX

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix **A** to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix **B** to the petition and is unpublished.

X

JURISDICTION

The date on which the United States Court of Appeals decided Petitioner's case was March 23, 1999.

A timely petition for rehearing was denied by the United States Court of Appeals on July 22, 1999, and a copy of the order denying rehearing appears at Appendix **D.**

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

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XII

STATEMENT OF THE CASE

1. On November 3, 1993, the Vandenberg Air Force Base ("VAFB") Chief of Security Police Investigations, a Master Sergeant, issued and authenticated a pick up order for the Petitioner, Hobert Parker, Jr., a civilian. The pick up order was issued despite being specifically prohibited by Air Force Instruction 31-201, chap. 6, para. 6.2.2 ("military authorities may not investigate or arrest persons [i.e. civilians] not subject to the UCMJ [Uniform Code of Military Justice].") The pick up order was in response to a telephoned report or complaint received from a hearsay

witness. This pickup order was, also, issued in spite of the requirement of Air Force Instruction 31-201, chap. 8, para. 8.2.1, which states: "Security police will obtain the installation commander's (or appointed military magistrate's) permission to conduct a probable-cause search." Despite a Freedom of Information Act Request, dated March 6, 1995, the Petitioner has not been provided with any written evidence that prior permission to search was obtained.

2. The basis for the pick up order was: "TRESPASSING/COMMUNICATING A THREAT & UNAUTHORIZED POSSESSION OF VAFB ID PASSES."

3. The true facts related to the alleged causes for the Petitioner's arrest were:

A. TRESPASSING--The non-secured, area where the Petitioner was allegedly trespassing was wide-open to the public. Base-entry passes were not required for this non-secured area. For people to obtain a base-entry pass for an initial entrance into the secured area it was necessary to enter this non-secured area. There were not any "no trespassing" signs in this non-secured area. However, there was a very-visible sign directing visitors to park in a specific parking lot where the Petitioner had parked on several different days. Before the issuance of the pick up order the Petitioner was never ordered to vacate this non-secured area while peacefully standing there, for short periods of time, on several different days. (**Trespasser**: A person who enters on the property of another without any right, lawful authority or an express or implied invitation or license. Black's Law Dictionary, Fifth Edition, 1979) Therefore, the above facts do not constitute trespass. (See District Court Clerk's Record 38, at page 5, paragraphs 25-31.)

B. COMMUNICATING A THREAT--The sole-direct witness received inadequate questioning by the Security Police Investigator. The Petitioner subsequently signed a declaration (see District Court Clerk's Record 38, at page 9, paragraphs 46-48) which quotes the sole-direct witness, "I did not perceive a threat. If I had been asked why I didn't initiate a report to the Security Police my answer would have been that I wasn't bothered by our telephone conversation and didn't believe it was necessary to make a report to the Security Police. Or something to that effect." (Emphasis added.). (The Air Force's response to Interrogatory no. 11 [see District Court Clerk's Record 33, at pages 27-30] was that the Air Force has no information with which to respond to questioning about the perception of the sole-direct witness in relation to an alleged threat.) The hearsay witness telephoned the Security Police 18 days after the Petitioner's telephone conversation with the sole-direct witness. During this time span the hearsay witness offered to rehire the Petitioner to, again, work on VAFB. (The Petitioner asserts that if the sole-direct witness did not perceive a threat or make a report to the Security Police it is illogical and unreasonable for any other person to state that a threat was made.)

C. UNAUTHORIZED POSSESSION OF VAFB ID PASSES--The Petitioner had resolved this issue prior to November 3, 1993, with the Pass & ID Section of the Security Police. However, the Investigator neglected to inquire with Pass & ID, or any other person, prior to issuing the pick up order. This prior resolution is confirmed by the audio-tape recording of the Petitioner's interrogation on November 15, 1993. New records created after the arrest do not mention this alleged offense. (Compliance with

existing investigative procedures would have prevented this alleged offense from being included on the pick up order.)

4. Although required by the Air Force's own regulations, civilian law enforcement was never contacted either before or after Petitioner's arrest. (Air Force Instruction 31-201, chap. 7, para. 7.1.2 states, "Since civilians are not normally subject to the UCMJ [Uniform Code of Military Justice], refer civilian violators to a US Magistrate for judicial disposition or to the local civil authorities having jurisdiction.") The Petitioner had no knowledge of any type of police controversy prior to his arrest on November 15, 1993. The Petitioner's normal reaction to his unexpected arrest was shock and anger. The Petitioner has never been provided with any written statement from the security police who were assigned to the security gate prior to Petitioner's arrest. Nor has any written evidence been received which contains a complaint by any person--except for the hearsay witness--about the Petitioner's conduct prior to his arrest.

A--The subsequent interrogation of Petitioner was, for the most part, tactful and was audio-tape recorded at the Petitioner's request. The Petitioner was released--without any charges ever being filed--after being in custody for 2 hours and 45 minutes and a consented search of the Petitioner's vehicle which was in the nonsecured area.

5. On November 16, 1993, unbeknownst to the Petitioner, statements were faxed to the Security Police by the General Foreman (the hearsay witness) and the Superintendent (the sole-direct witness). A pertinent part of a written statement by the Superintendent states: "During one of his [Petitioner's] phone calls to me he mentioned he

had contemplated getting a gun to take care of business but that that wouldn't be the right thing to do. I didn't think much more about it, but I did mention the conversation about the gun to my General Foreman." (Emphasis added.)

6. On July 5, 1994, the VAFB Judge Advocate mailed to the Petitioner an "insufficient evidence to warrant prosecution" letter. (At this time neither the Commander--nor any other person--considered the Petitioner to be a "security risk" or believed a barment order was necessary.)

7. In October of 1994, the Petitioner was issued an unrestricted, base-entry pass to work on South VAFB, an extremely-high-security area--the location where the alleged offenses occurred. (Again, indicating there was no security risk or need for a barment order.)

8. There was absolutely no law enforcement activity in relation to the Petitioner on VAFB between July 5, 1994, and December 30, 1994, when the Petitioner received a partial-barment order from VAFB. Nor was there any indication of any type of problem or complaint involving the Petitioner on VAFB. (In reference to the impropriety of nos. 6, 7, and 8, above and the "considered to be a threat to the maintenance of good order and discipline on this installation" within the partial-barment order, please refer back to page i, **QUESTIONS PRESENTED**, no. 4.)

9. The Petitioner was deprived of possible witness statements, despite several Freedom of Information Act Requests, until Petitioner "accidentally" received them from Defendant-Cook's-Welding in small claims court on December 8, 1994. The Petitioner had no prior knowledge

that the Air Force possessed any witness statements. (These statements are referred to in no. 5 above.)

10. On November 9, 1994, the Petitioner requested, within a letter (with U.S. Senator Dianne Feinstein as an intermediary), a 45 minute appointment with the Air Force Secretary who was scheduled to visit VAFB on January 9, 1995. The quoted purpose for the requested appointment was:

> "Currently, there is a raging controversy between the VAFB Security Police, the VAFB Judge Advocate's office, and me, Hobert Parker, Jr.
>
> The advantages:
>
> A-For You-An opportunity to correct a wrong and thereby reduce the effects of the afore-mentioned controversy and prevent damaging publicity and controversy and possibly prevent another "trouble" [a lawsuit] which You--like all people--could do with out.
>
> B-For me-Justice."

The request for an appointment was denied. During this time span the Petitioner had, also, made a reservation to attend a social function, featuring the Secretary, at the Officer's Club on VAFB to which the public was invited by a local newspaper article. The Petitioner asserts that the true cause for the barment order was an intention to prevent the Petitioner from talking with the Air Force Secretary.

11. On December 30, 1994, the VAFB Commander issued a barment order for the Petitioner. The order informed that the Petitioner was considered to be a threat to the maintenance of good order and discipline on the installation. The alleged crimes stated in the order were: **"your [Petitioner's] involvement in trespassing, nuisance telephone calls, verbal threats, and, disorderly conduct between 13 Oct and 11 Nov 93, while on Vandenberg AFB. Additionally, you are considered to be a threat to individuals who work on, or visit, the confines of Vandenberg AFB."** The order contained an exception which allowed the Petitioner, with limitations, to enter and work on South VAFB, an extremely-high-security area and the location where the stated offenses allegedly occurred.

A--This exception stimulates this proper question: Whether the exception belies and nullifies the Commander's assertion that the Petitioner's presence on VAFB was considered to be a threat to the maintenance of good order and discipline?

B- The basis for the barment order (and the investigative report) specifically states that the alleged offenses occurred **"between 13 Oct and 11 Nov 93"**. However, according to <u>other</u> Air Force official records the allegation of disorderly conduct allegedly occurred on November 15, 1993, when the Petitioner was arrested. The allegation of nuisance telephone calls, according to <u>other</u> Air Force official records, allegedly occurred after November 15, 1993.

12. On March 28, 1995, the Petitioner requested, in writing, that the VAFB Commander provide proof of the allegations in the barment order or that criminal prosecution of Petitioner be arranged. There was no response.

13. From the Air Force Legal Services Agency, the Petitioner received by "accident" part of an inter-office memorandum, dated 26 Jul 1995, which states, in pertinent part, "If claimant was represented by a competent attorney, I believe we would have some exposure as to a claim for false arrest/imprisonment. But if a wrongful detention was proved, I do not believe a judge would award more than the most nominal of damages, given the facts of this case." (See District Court Clerk Record no. 36, Exhibit 8, page 0136.)

14. After Petitioner made several unsuccessful administrative attempts to obtain proof of the barment order's allegations, he initiated litigation in District Court on August 28, 1996. The primary purpose was for a District Court order requiring the Air Force to provide proof of the accusations within the barment order or to retract them.

15. In all of the documents the Petitioner has submitted to the lower Courts, the Petitioner has never challenged the barment order, per se, or the Commander's authority to exclude persons from the Base; rather, the challenge has been to the truth of the allegations which were stated as the official basis for the barment order.

16. The Magistrate's Report and Recommendation (adopted by the District Court) in pertinent part states:

A--"Plaintiff seeks an evaluation of the truth of the facts underlying the allegations in the administrative record which is clearly beyond the permissible scope of review. This Court is limited to consideration of the question whether, assuming the allegations in the record are true, defendants' barment order based on those facts was patently arbitrary or discriminatory. Cafeteria Workers, id.[1] Review of the record makes it abundantly clear that the conduct attributed to plaintiff, if true, would justify a barment order in the interest of maintaining order, safety, and security on Vandenberg Air Force Base." (See Appendix C, page 13, lines 17-23 and page 14, lines 1-3.)

B--"Similarly, the commanding officer here was well within his broad discretion in deciding to bar plaintiff based on the evidence contained in the administrative record, even considering those facts which plaintiff concedes. Plaintiff admittedly engaged in at least some conduct which could reasonably be considered disorderly, harassing and threatening. Although explanations, excuses or extenuating circumstances may exist, it is clear that the commander's decision was not irrational, and there is no support for a finding that the decision was patently arbitrary or discriminatory. Accordingly, plaintiff's motion for summary judgment should be denied and defendants' motion should be granted." (Emphasis in original.)

---

[1] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1961).

C--In "A", above, the Magistrate's Report states that evaluation of the facts underlying the allegations in the administrative record "is clearly beyond the permissible scope of review." However, further in the paragraph there is mention that the record was reviewed--"review of the record makes it abundantly clear . . . ." Also, in "B", above, the Magistrate's Report does not specify what "some" admitted conduct there was "which could reasonably be considered disorderly, harassing and threatening." The Petitioner has not admitted any of the alleged offenses stated in his barment order which were the specific, official basis for the order. The truth of these alleged offenses are what the Petitioner has challenged in this litigation. (All other alleged offenses and/or those in the barment order and their respective dates that were not specifically and correctly stated in the barment order are not relevant and should not be considered by the Courts. Accusers have the moral and legal responsibility of being accurate when making accusations.) [Please refer back to page 9, no. 11 "B".]

D--Neither are there any explanations for, nor examples of, "Although explanations, excuses or extenuating circumstances may exist . . . ." (These facts should have been available for the scrutiny of the District Court and higher Courts.)

XIII

REASONS FOR GRANTING THE PETITION

1. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest, for though due process generally implies and includes regular allegations, and a trial according to some settled course of judicial proceedings, that is not universally true." Const. Amend. 5; Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1961).

A--Petitioner asserts that "regular allegations" include the type of offenses alleged in the barment order that Petitioner was **"involved in trespassing, nuisance telephone calls, verbal threats, and, disorderly conduct between 13 Oct and 11 Nov 93, while on Vandenberg AFB. Additionally, you [Petitioner] are considered to be a threat to individuals who work on, or visit, the confines of Vandenberg AFB."**

B--Petitioner asserts that due process should be the right of any person who has been accused by a military commander of offenses that are "regular allegations" which are punishable by imprisonment if proved in a court of law.

2. "Consideration of what procedures due process may require under any given set of circumstances begins with a determination of precise nature of government function involved as well as private interests that have been affected by governmental action." Const. Amend 5; Id., Cafeteria Workers.

A--The Petitioner asserts that every person accused of punishable offenses, by a military commander within a barment order, has the private interest of the right to "be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction is a principle basic to our society." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951).

B--"But it [a barment order] ought not to affix a "badge of infamy," Wieman v. Updegraff, 344 U.S. 183 at page 191, 73 S.Ct. 215 (1952) at page 218, to a person without some statement of charges, and some opportunity to speak in reply."

C--According to Air Force Instruction 31-209, chap. 2, para. 2.8, "Barment orders should be in writing and contain sufficient details to support prosecution by civilian authorities." (The Petitioner was never prosecuted.)

D--"Administrative orders of commanding officers of military installations are not beyond reach of the courts and are not nonreviewable." Bridges v. Davis, 443 F. 2d 970, 973-974 (9th Cir. 1971).

E--"The military is an "agency" within the meaning of the Administrative Procedures Act," 5 U.S.C. Sections 700-706, Guerrero v. Stone, 970 F. 2d 626 (9th Cir. 1992). "The only exceptions of the APA applicable to the military are those for "military authority exercised in the field in time of war or in occupied territory" and "courts martial and military commissions." Guerrero at p. 628. "Military Records Board decisions are subject to judicial review" and "can be set aside if they are arbitrary or not based on substantial evidence." Id. at p. 628.

3. It is important for the Court to clarify whether the First Amendment protects speech that is not perceived as threatening by the sole-direct witness during a private telephone conversation.

A--**Threat**: "All that is necessary is that it be definite and understandable to a mind of ordinary intelligence." State v. Wilbourn, 219 Iowa 120, 257 N.W. 571. According to the Law the perception of the sole-direct witness is the primary, if not the only, determinant of whether a true threat was made. (The sole-direct witness, the job Superintendent, did not perceive a threat or initiate a complaint or report to the VAFB Security Police. The Air Force's response to Interrogatory no. 11 was that it has no information with which to respond to questioning about the perception of the sole-direct witness in relation to an alleged threat.)

B--"Governments need and have ample power to punish unreasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts." Wieman v. Updegraft, 344 U.S. 215, at page 220; 73 S. Ct. 215 (1952).

4. "State and federal governments, even in exercise of their internal operations, do not constitutionally have complete freedom of action enjoyed by private employers." Id., Cafeteria Workers.

A--The Petitioner has never challenged his barment order, per se, or the Commander's internal operations authority to exclude persons from the Base; rather, the challenge has been to the accuracy of the "regular allegations" officially stated within the barment order.

B--Despite this specific, repeated "non-challenge" in documents submitted to lower Courts, the Courts have not ordered the Air Force to furnish proof of the accusations or to retract them as requested in Petitioner's Complaint. The Petitioner respectfully asserts that if the Air Force has complied with 18 U.S.C., Section 1001 (prohibits false official statements) there is no valid cause for its continued refusal to provide proof of the allegations against the Petitioner or to retract them. Nor is there proper cause for the lower Courts to not order the Air Force to furnish proof of the allegations or to retract them.

5. It is important for the Supreme Court to issue a ruling as to whether the veracity of the accusations within a military barment order is, or can be, a separate and distinct Fifth Amendment issue WITHOUT a challenge to the barment order, per se, or the Commander's authority to exclude civilians from a military installation.

6. It is important for the Supreme Court to issue a ruling whether, and to what extent, any evidence derived from a false arrest can be the basis for accusations within a barment order.

7. Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L.Ed. 2d 1230, (1961) is the primary and dominant Supreme Court decision in relation to military barment orders. The litigant therein was described as being, simply, a "security risk". It is important for the Supreme Court to issue a ruling to provide judicial guidance for the issuance of military barment orders where the facts are greatly different--e.g. this case-- from Cafeteria Workers and which will cause the standards of Cafeteria Workers to be judicially inapplicable and improper. (Cafeteria Workers allows a Commander to exclude persons from a military installation for all but patently arbitrary and

capricious causes. The APA only uses arbitrary and capricious.)

8. It is important for the Court to clarify whether the Fourth Amendment requires that military authorities:

A--Determine whether the sole-direct witness perceived a threat before alleging this offense within a pick up order.

B--Determine whether there is probable cause that trespassing has occurred before alleging this offense within a pick up order.

C--Provide, within a reasonable time, complaining-witness statements when requested by an arrestee.

9. United States Supreme Court Rule 10 (a): ". . . .or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

A--The Petitioner filed his District Court action under the Administrative Procedures Act, 5 U.S.C., Sections 700-706, which states that Courts have the duty to review agency administrative actions which must be based on facts or substantial evidence. There is a violation of 18 U.S.C., Section 1001 when official statements are made, ". . .or at least [made] with reckless disregard of truth and with conscious purpose to avoid learning truth." United States v. Evans, 559 F. 2d 244 (5th Cir. 1977) cert. den., 435 U.S. 945, 55 L. Ed. 2d 542, 98 S.Ct. 1528 (1978).

B--Despite these APA review requirements the District Court's ruling was: "Plaintiff seeks an evaluation of the facts underlying the allegations in the administrative record which

is clearly beyond the permissible scope of review. This Court is limited to consideration of the question whether, assuming the allegations in the record are true, defendants' barment order based on those facts was patently arbitrary or discriminatory. Id., Cafeteria Workers."

C--The Ninth Circuit Court of Appeals' Memorandum affirming the District Court decision stated in pertinent part, "the Air Force determined Parker trespassed on the Base and was guilty of disorderly and threatening conduct." However, on July 5, 1994, the Vandenberg AFB Judge Advocate sent the Petitioner an "insufficient evidence to warrant prosecution letter." This letter is part of the evidence the Petitioner has submitted to the lower Courts. This contradiction stimulates reasonable doubt as to whether all evidence had been adequately or properly considered by the Court of Appeals. Also, the Memorandum does not mention how or when "the Air Force determined Parker trespassed on the Base and was guilty of threatening and disorderly conduct." There was no due process whatsoever. (Every person is presumed innocent until proven guilty.)

XIV

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 15, 1999.

RESPECTFULLY SUBMITTED,

Hobert Parker, Jr.,
Petitioner, Pro Se

Supreme Court, U.S.
FILED
99 583 SEP 21 1999
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

Hobert Parker, Jr.--PETITIONER

VS.

UNITED STATES AIR FORCE/
UNITED STATES OF AMERICA--RESPONDENT(S)

APPENDIX TO PETITION FOR CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

APPENDIX

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FOR CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

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Hobert Parker, Jr.
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No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

APPENDIX "A"

DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

Hobert Parker, Jr.
205 South Huntington Place
Lompoc, Calif. 93436
805-736-0380

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MARCH 23, 1999
CATHY A. CATTERSON
CLERK, U.S. COURT
OF APPEALS

HOBERT PARKER, JR. Plaintiff-Appellant VS. UNITED STATES AIR FORCE; UNITED STATES OF AMERICA Defendants-Appellees	No. 98-56703 D.C. No. CV-98-05939-R MEMORANDUM 1

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief Judge, Presiding

Submitted March 15, 1999 2

Before: GOODWIN, KOZINSKI and
LEAVY, Circuit Judges

1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2 The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a).

APPENDIX "A"

Hobert Parker, Jr. appeals pro se the district court's summary judgment dismissal of his action challenging the Vandenberg Air Force Base Commander's issuance of a barment order on 12/30/94 which bars Parker from the Air Base for three years. Parker had been employed by an independent contractor on the Base and the Air Force determined Parker trespassed on the Base and was guilty of disorderly and threatening conduct.

We conclude the district court did not err when it granted judgment for the government because military commanders may exclude civilians from a military base for all but patently arbitrary or discriminatory reasons, which did not occur here. *See Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 898 (1961); *Bridges v. Davis* 443 F. 2d 970 (9th Cir. 1971).

AFFIRMED

APPENDIX "A"

No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

APPENDIX "B"

DECISION OF THE UNITED STATES
DISTRICT COURT

Hobert Parker, Jr.
205 South Huntington Place
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Filed
Clerk, U.S. District Court
August 14, 1998
Central District of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HOBERT PARKER, JR., Plaintiff, V. UNITED STATES AIR FORCE, et al., Defendants.	Case No. CV 96-5939-R (CW) **(AMENDED)** ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636 (b) (1) (C), the Court has reviewed the entire record in this action, as well as the Report and Recommendation of the United States Magistrate Judge and plaintiff's objections and amended objection thereto. The Court concurs with and adopts the findings and conclusions of the Magistrate Judge.

APPENDIX "B"

IT IS ORDERED that: (1) the Report and Recommendation of the United States Magistrate Judge be adopted; (2) plaintiff's motion for summary judgment is denied; (3) defendants' motion for summary judgment is granted; and (4) judgment is entered in favor of defendants.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment of this date on plaintiff and counsel for defendants.

DATED: *Aug. 14, 1998*

Signed By:
MANUEL L. REAL
United States District Judge

APPENDIX "B"

No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

APPENDIX "C"

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Hobert Parker, Jr.
205 South Huntington Place
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Filed
Clerk, U.S. District Court
JUL 30 1998
Central District of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HOBERT PARKER, JR., Plaintiff	No. CV 96-5938-R (CW)
v.	REPORT AND RECOMMENDATION OF UNITED
UNITED STATES AIR FORCE, et al., Defendants	STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, defendants' Motion for Summary Judgment should be granted.

PROCEEDINGS

On August 27, 1996, plaintiff Hobert Parker, Jr., a civilian construction worker formerly employed by a private company that had a contract to perform work at Vandenberg Air Force

Base ("VAFB"), filed a complaint seeking a declaratory judgment against the United States Air Force ("USAF") and the United States of America.[1] Plaintiff's Complaint was dismissed with leave to amend on March 17, 1997, after defendants moved to dismiss on grounds of sovereign immunity and failure to provide a short and plain statement of a claim under Fed. R. Civ. P. 8 (a). (See Memorandum and Order dated March 17, 1997.)

On March 27, 1997, plaintiff filed his First Amended Complaint, alleging that defendants violated the Administrative Procedures Act (5 U.S.C. Section 701 et seq. ("APA") and 18 U.S.C. Section 1001, a criminal statute concerning fraud and false statements.[2] Plaintiff's claims stem from a "bar letter" dated December 30, 1994, from Lance W. Lord, Brigadier General of the United States Air Force, which placed restrictions on plaintiff's ability to enter Vandenberg Air Force Base for three years. [See Defendants' Motion for Summary Judgment ("Def. Mot.") Ex: B-1] Plaintiff alleges that the commander's decision to bar plaintiff

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[1] Plaintiff also filed a separate Freedom of Information Act lawsuit in this district, case number CV 96-5938-R. That case was dismissed pursuant to a settlement agreement on April 28, 1997.

[2] No private cause of action exists for violations of 18 U.S.C. Section 1001, which precludes making false statements in a matter involving a federal agency. Johnson v. Cullen 925 F. Supp. 244 (D. Del. 1996); Williams v. McCausland, 791 F. Supp. (S.D. N.Y. 1992). Therefore, plaintiff's claim based on this federal criminal statute is not cognizable.

from the base relied on false accusations, and that the decision was therefore arbitrary and capricious. (First Amended Complaint ("FAC") at p. 2.] Plaintiff does not seek monetary damages or to have the barment order itself revoked. He seeks only injunctivet relief: (1) to enjoin defendants to furnish proof of each alleged offense listed in the exclusion order, or, in the alternative, to enjoin defendants to retract all allegations without proof; and (2) to enjoin defendants from interfering with plaintiff's future employment, from initiating contact with plaintiff's future employers, and from furnishing any information to future employers. [FAC at pp 4-5.]

On April 9, 1997, defendants answered plaintiff's First Amended Complaint. On July 18, 1997, defendants filed a motion for summary judgment. Plaintiff filed an opposition on August 20, 1997, and defendants filed a reply on September 2, 1997.

Plaintiff filed several largely unsuccessful discovery motions,[3] and on December 2, 1997, the Court granted defendants' ex parte application for a stay of discovery pending resolution of defendants' summary judgment motion. [Minute Order, December 2, 1997.]

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[3] Plaintiff has also made at least five Freedom of Information Act requests through which he has obtained documents related to his claims in this lawsuit in addition to the discovery responses he has received from defendants. [Plaintiff's Motion for Summary Judgment. ("P. Mot.") at pp. 5-6.]

On January 9, 1998, plaintiff filed a cross motion for summary judgment. Defendants filed an opposition on January 27, 1998, and plaintiff filed a reply on February 11, 1998.

ADMINISTRATIVE ACTION

The VAFB Commander issued a "bar letter" on December 30, 1994, which ordered plaintiff not enter the confines of VAFB, except that plaintiff was permitted to travel on three specified public roads where they pass through VAFB, but was required to stay on the paved roadway unless there was an emergency[4] [Def. Mot., Ex. B-1.] This order was to remain in effect for three years from the date of plaintiff's acknowledgment, until December 30, 1997. [Id.] [5]

[4] The letter permitted plaintiff to enter the confines of VAFB, as needed, to continue his employment with Schufs Steel, a sub-contractor then performing work at Space Launch Complex Three, for whom plaintiff was then employed, but plaintiff was ordered to use the pass he had been issued and to follow the most direct route to and from his place of work. [Def. Mot., Ex. B-1] Plaintiff was also permitted to enter the base to attend scheduled Magistrate Court if he presented a copy of the "bar letter" and a summons to security police personnel at the visitor control center and obtained the appropriate visitor pass. [Id.]

[5] The expiration of the bar order does not render this case moot because plaintiff seeks equitable relief quite apart from a right to return to the base. See Church of Scientology

(Continued ...)

In the "bar letter", the Base Commander indicated that he considered plaintiff's presence on the base to be a threat to the maintenance of good order and discipline due to plaintiff's involvement in trespassing, nuisance telephone calls, verbal threats, and disorderly conduct between October 13 and November 11, 1993, while on VAFB. [Id] Additionally, the Base Commander stated that plaintiff was considered a threat to individuals who worked on or visited the confines of VAFB. [Id.]

In making the determination to bar plaintiff from VAFB, the Base Commander relied on a Security Police Report of Investigation prepared by Chief Security Police Officer James MeGill; twenty exhibits which were attached to the Report (including witness statements from Security Police officers and civilian employees of Cook's); a tape recorded interview with plaintiff; a Staff Summary Sheet, summarizing the investigation and proposed bar order; a Summary of a USAF member's appearance at a small claims court hearing on a complaint brought by plaintiff against Cook's; and, a psychological evaluation of plaintiff prepared by the VAFB Chief of Mental Health Services. [Def. Mot., Declaration of Kerry Joseph Kubick.] Prior to the Base Commander's decision to order plaintiff barred from VAFB, the matter was reviewed by the Judge Advocate's office, to determine whether to pursue criminal prosecution of plaintiff. [Def. Mot.., Ex. A, p. 4.] After its review, the Judge Advocate's Office recommended administrative action, namely, that plaintiff be ordered partially barred from VAFB. [Def. Mot., Ex. B-1.]

[5] **(...Continued)** v. U.S. , 506 U.S. 9, 12-13, 113 S.Ct. 447, 450, 121 L.Ed. 2d 313 (1992) (holding that court's ability to grant "any effectual relief whatever" precludes mootness)..

FACTS

Plaintiff admits that many of the incidents included in the administrative record occurred, but disputes the USAF's interpretation of these incidents. Thus, plaintiff contends, use of these incidents as a basis for ordering him barred from the base was arbitrary and capricious. The facts underlying the "bar letter" are as follows:

Plaintiff was employed as a construction worker by Cooks Welding Company ("Cooks"), and Air Force contractor that had "limited contractor access" to a high security space launch facility at Vandenberg Air Force Base. [Def. Mot., Ex. A.] Cooks terminated plaintiff's employment on October 13, 1993. [Def. Mot., Ex. A-3; Declaration of Hobert Parker, Jr. in Support of Motion for Summary Judgment ("Parker Dec.") at paragraph 3.] Plaintiff agrees that he became irate and upset upon learning of his termination, [6] and "flung [his] VAFB vehicle and personal passes out the window" of his vehicle as he drove from the job site. [Parker Dec. at paragraph 5; Def. Mot., Ex. A-4.] Plaintiff did not surrender his vehicle and personal or vehicle passes are required in the secure areas of VAFB. [Plaintiff's Statement of Genuine Issues in Opposition to Motion for Summary Judgment. ("P1, Gen. Issues") at p. 5; Def. Mot., Ex. A-3]

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[6] Plaintiff was told he was being terminated because Cook's had "too many people on the job" [Pl. Mot., Ex. A, pp 38-39] Plaintiff, however, believed the reason given for his termination was false, because several workers were dispatched to Cook's from his union the same morning that he was terminated. [Id.]

During a telephone conversation with one of his former supervisors, Ray Wilcox, soon after plaintiff's termination, plaintiff said:

> I am not going to cause any trouble or go to the National Labor Relations Board or anything like that. I considered doing several things. I considered getting a gun and killing people. I considered going on a hunger strike and picketing the Base. But I'm not going to do any of those things. But if I am ever done wrong in the future, the shit is going to hit the fan.

(Parker Dec. at para. 7; Def. Mot., Ex. A-3.) Plaintiff concedes that he made the foregoing statement to Ray Wilcox, but contends that, in context, it was not a threat. In his Declaration supporting his motion for summary judgment, plaintiff states, " [b] etween October 14, 1993 and November 15, 1993, on many occasions, I drove to the nonsecured area of the SVAFB entry point and stood, silently looking at the employees of Cooks for the purpose of causing those who had illegally terminated my employment to feel ashamed of themselves." [Parker Dec. at para. 11.]

Security Police Investigator James MeGill was assigned to conduct an investigation for the USAF. As part of the investigation, Investigator MeGill obtained a California Law Enforcement Terminal printout revealing plaintiff's history of past arrests. Plaintiff does not dispute the existence of arrests on June 13, 1983, January 16, 1985, and June 7, 1988 (which resulted in a conviction for disturbing the peace); however plaintiff notes that the 1983 arrest resulted in a dismissal of all charges. [Gen. Issues at p. 17; Def. Mot., Ex. A-16.] Plaintiff also does not dispute that Officer MeGill obtained an

Oakland Police Department report regarding the June 13, 1983 arrest, that recommended charging plaintiff with disturbing the peace, drunk in public, and resisting arrest. [Id.] Investigator MeGill attempted, unsuccessfully, to contact plaintiff by telephone for an interview three times between November 3, 1983 (the date MeGill learned of plaintiff's alleged threats and loitering) and November 15, 1983. [Def. Mot., Ex. A, p. 1.]

A 'Pick Up/Restriction Order" dated November 3, 1993, was issued directing the VAFB Security Police to "stop/detain/hold" plaintiff for special investigation due to "trespassing/communicating a threat/unauthorized possession of VAFB ID passes." [Def. Mot., Ex. A-6;Parker Dec., Ex. E.] The Pick Up Order notes that "subject has been loitering outside the SVAFB gates every morning," and includes a paragraph captioned "additional information" which notes that plaintiff had reportedly in the past displayed a handgun in a union hall back east during a conflict with another past employer, and advises personnel to use extreme caution as he may be armed and dangerous. [Id.}

On November 15, 1993, plaintiff was stopped and detained by VAFB Security Police. [Parker Dec. at paragraphs 14-20.] Upon being stopped, the officers asked him to step out of the car, frisked, and handcuffed him. [Id.} Plaintiff was taken to Security Police Headquarters for questioning, and plaintiff describes his own behavior while inside the headquarters as "uncooperative, belligerent, and profane." [Parker Dec. at para. 18; Def. Mot., Exs. A-8, A-9, A-10, A-11, A-12, and A-13.} Plaintiff was released approximately 2 hours and 45 minutes after he was stopped.{Parker Dec. at para. 20.] Plaintiff does not dispute that the foregoing events

but does dispute whether the occurrence was an arrest or a detention.

Investigator MeGill reports that he received "thirty or more telephone calls from and/or messages to call" plaintiff between November 15 and November 29, 1993. [Def. Mot., Ex A, p. 3.] In these telephone calls plaintiff requested the immediate release of information, or asked questions as to the status of "his case." [Id.] MeGill also contends that plaintiff called his home several times and that he began to receive hang-up calls at his home during this time period. [Id.] Plaintiff concedes calling MeGill at work, but disputes that these calls were harassing in nature, and disputes having called MeGill's home at all, except for one time. [Parker Dec. at para. 25.]

On November 19, 1993, Law Enforcement patrolmen reported that plaintiff "had begun to 'picket' (wearing sandwich style boards depicting comments towards [sic] Cook's Welding) outside the South Vandenberg AFB gate area at the Highway 246 intersection." [Def. Mot., Ex. A, p.3.] Plaintiff also concedes that he did this.

Plaintiff agrees that another incident occurred on VAFB property on December 28, 1993, in which plaintiff was standing several feet off the roadway at the SVAFB entrance when an officer approached asking for his name, and that after an exchange of words, (the contents of which is disputed), plaintiff walked across the roadway and waited for the officer. [Parker Dec. at paragraphs 21-23; Def. Mot., Ex. A-19.]

STANDARD OF REVIEW

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc.477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion, and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2546, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed R. Civ. P. 56(e), Celotex, 477 U.S. at 324.

In determining whether a triable issue of material fact exists, the evidence must be considered in the light most favorable to the non-moving party. Id. at 1134. Howeer, summary judgment cannot be avoided by relying solely on conclusory allegations unsupported by factual data. Taylor v. List, 880 F. 2d 1040, 1045 (9th Cir. 1989). More than a "metaphysical" doubt is required to establish a genuine issue of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986). A party opposing a properly supported motion for summary judgment " . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson, id., 477 U.S. at 247, citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20L.Ed. 2d (1968).

"[T] he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, id. 477 U.S. at 247-248. As to materiality, the substantive law will identify which facts are material. Id. at 248.

DISCUSSION

Considering the evidence presented by the parties in the light most favorable to plaintiff, there is no genuine issue of material fact here. Plaintiff's disputed facts are not material given the Court's limited scope of review under the case law discussed below.

A. The Parties Motions

Defendants' Motion for Summary Judgment asserts that both the standard and scope of review are extremely narrow under the APA. Case law addressing barment orders limits the Court's review to the administrative record only, setting aside a commanding officer's action only if it was patently arbitrary or discriminatory. Defendants further contend that a base commander has broad discretion to exclude civilians from the base, and that review of the administrative record indicates that the base commander's decision here was rational. Accordingly, defendants assert that they are entitled to summary judgment.

Plaintiff's Motion for Summary Judgment states that the APA standard of review for a base commander's decision to

exclude a civilian is that the decision must not be arbitrary or capricious. Plaintiff argues that the allegations contained in the administrative record are not supported by evidence, but instead are false conclusions made by Air Force personnel. Therefore, plaintiff argues, the commander's barment order relying upon them is arbitrary and capricious. Plaintiff claims that his statements about getting a gun and killing people cannot be considered to be threats according to the law, and that defendants' conclusion that these statements were threats were faulty. Plaintiff further contends that defendants falsely conclude that he was trespassing. Plaintiff also alludes to several new statutory and constitutional claims which are not alleged in the FAC, including allegations that defendants falsely arrested him and violated his First Amendment rights by retaliating against him for protected speech (his alleged threats, raising his voice, and picketing). Despite raising the foregoing factual disputes, plaintiff concludes there is no genuine issue of material fact and that he is entitled to summary judgment.

B. Defendants' Decision to Bar Plaintiff from VAFB Was Not Patently Arbitrary or Discriminatory

The Administrative Procedure Act, 5 U.S.C. Sections 701-706, contains a waiver of sovereign immunity that applies to cases in which the plaintiff seeks non-monetary relief for an alleged legal wrong caused by an agency action. Stehney v. Perry, 101 F. 3d 925, 932 (3d Cir. 1996); Hostetter v. United States, 739 F.2d 983, 985 (4th Cir. 1984); see also W.B. Fishburn Cleaners, Inc. v. Army & Air Force Exchange Service, 374 F. Supp. 162, 164-166 (N.D. Tex. 1974). Under the APA, the standard of review applied

to administrative agency decisions is whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Camp v. Pitts, 411 U.S. 138, 141, 93 S.Ct. 1241, 36 L.Ed. 2d 106 (1973); 5 U.S.C. Section 706 (2) (A).

Where the agency decision at issue is the decision of a military base commander to bar a civilian from a military base, the standard of review is even further refined and narrow. When reviewing barment orders, the Court must determine whether the "announced grounds" for exclusion were "patently arbitrary or discriminatory." Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed. 2d 1230; Berry v. Bean, 796 F. 2d 713, 717 (4th Cir. 1986); Bridges v. Davis 443 F.2d 970, 973-74 (9th Cir. 1971).[7] This extremely strict standard of review is justified by the long-

[7]Defendants correctly state the standard of review for barment orders, while noting that neither Cafeteria Workers, nor any of its progeny cite to the APA. The APA provides only the waiver of sovereign immunity that permits plaintiff to sue the United States; it does not provide subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed. 2d 192 (1977); Albert v. Chafee, 571 F.2d 1063, 1064 (9th Cir. 1978). Subject matter jurisdiction is derived from 28 U.S.C. Section 1331 (a). Califano. id. (noting that the effect of a then-recent amendment to Section 1331 (a) which eliminated the requirement of a specified amount-in-controversy in an action against a government agency, "is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate").

recognized need for military commanding officers to possess broad discretion to exclude civilians from a military base. Cafeteria Workers, id., 367 U.S. at 891 (finding that, "[i] t would be difficult to conceive of a more specific conferral of power upon a commanding officer, in the exercise of his traditional command responsibility, to exclude from the area of his command, a person [with civilian status]."); Bean, id., 796 F.2d at 716 (recognizing that the Supreme Court has long noted that special considerations obtain when courts are asked to review the judgments of military authorities); Serrano Medina v. United States, 709 F. 2d 104, 107 (1st Cir. 1983) (Observing that "[o] ur law has accorded significant autonomy to the military with respect to civilian and judicial interference.")

In keeping with this level of deference to commanding officer decisions, the subject matter to be considered in the Court's review of barment orders is particularly limited as well.[8] The Court should not probe into the factual basis for the barment order. (Cafeteria Workers, id. 367 U.S. at 898), or delve into the truth or falsity of the facts behind the exclusion (Serrano Medina, 709 F. 2d at 109), Bean, id. 796 F.2d at 717. Where, as here, the claimed basis for arbitrariness is the lack of an adequate factual basis for the

[8] Judicial review of non-military agency decisions is also quite narrow in scope; it "typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court." Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443 (9th Cir. 1996); citing Camp v. Pitt, id. 411 U.S. at 142.

exclusion, the Court is allowed, at most, to "question whether the allegations, assumed to be true, are such as would constitutionally permit an exclusion order to stand; that is whether the assumed facts may constitutionally be the basis for the judgment that" plaintiff should be excluded. Serrano Medina, id. citing Cafeteria Workers, id. See Bridges v. Davis, 443 F.2d at 974 (Koelsch, J., concurring) (recognizing that Cafeteria Workers standard does not require substantial proof of actual misconduct and requires upholding bar orders "even though the result of gossip and unconfirmed rumor").

Plaintiff seeks an evaluation of the truth of the facts underlying the allegations in the administrative record which is clearly beyond the permissible scope of review. This Court is limited to consideration of the question whether, assuming the allegations in the record are true, defendants' barment order based on those facts was patently arbitrary or discriminatory. Cafeteria Workers, id. Review of the record makes it abundantly clear that the conduct attributed to plaintiff, if true, would justify a barment order in the interest of maintaining order, safety, and security on Vandenberg Air Force Base.

Moreover, even based on the facts that plaintiff does not dispute, this would be true. Civilians may properly be removed from military bases for a wide variety of reasons including: "reconnoitering military fortifications or troop movements, destroying government property, creating a disturbance, violating a traffic regulation, attempting to induce a soldier to visit a saloon or engage in an immoral act, wandering into an area where a training exercise is in

progress, or perhaps even 'chewing gum in the wrong place'." United States v. Albertini, 472 U.S. 675, 694 and fn4, 105 S.Ct., 2897, 86 L.Ed. 2d. 536 (1985) (Stevens, J., dissenting), citing the record in Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed. 2d 505 (1976) which indicated that bar orders have been issued for, among other grounds, contributing to the delinquency of a minor, impersonating a female, fraud, and unauthorized use of an ID card.[9]

In Tokar v. Hearne, 699 F. 2d 753 (5th Cir.), Cert denied, 464 U.S. 844 (1983), a barment order was upheld in the face of a claim similar to plaintiff's, "that the decision was made without sufficient factual basis and without objective standards." The plaintiff in Tokar was the wife of a retired serviceman, and was barred from the military base for three years based on a record that included three allegations : assault of an individual by throwing a drink in his face; evidence that she may have planted marijuana in the automobile of a student pilot, in order to cause adverse disciplinary action against him; and evidence that she was on the base without a valid ID card. Id. Mrs. Tokar argued that the factual basis for barment was patently arbitrary because the commanding officer relied solely on evidence from the

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[9] In Albertini and Greer, the Supreme Court upheld the broad authority of military base commanders to exclude civilians even where First Amendment rights are implicated. See Albertini, 472 U.S. at 684-90 (affirming criminal conviction for anti-war demonstrator's violation of bar order); Greer, 424 U.S. at 838-40 (approving application of regulations barring political candidates from campaigning on military base).

Security Police and did not further investigate the allegations made against her. Noting the base commander's wide discretion, the court found that plaintiff had not shown that the barment was patently arbitrary or discriminatory. Id. 699 F.2d at 756.

Similarly, the commanding officer here was well within his broad discretion in deciding to bar plaintiff based on the evidence contained in the administrative record, even considering only those facts which plaintiff concedes. Plaintiff admittedly engaged in at least some conduct which could reasonably be considered disorderly, harassing and threatening. Although explanations, excuses or extenuating circumstances may exist, it is clear that the commander's decision was not irrational, and there is no support for a finding that the decision was patently arbitrary or discriminatory. Accordingly, plaintiff's motion for summary judgment should be denied and defendants' motion should be granted.

RECOMMENDATION

It is recommended that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) denying plaintiff's motion for summary judgment; and (3) granting summary judgment in favor of defendants.

DATED: July 30, 1998.

Signed By:
CARLA M. WOEHRLE
United States Magistrate Judge

No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

APPENDIX "D"

DENIAL OF PETITION FOR REHEARING BY NINTH CIRCUIT COURT OF APPEALS

Hobert Parker, Jr.
205 South Huntington Place
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805-736-0380

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 22, 1999
CATHY A. CATTERSON, CLERK
U.S. Court of Appeals

HOBERT PARKER, JR.,	No. 98-56703
Plaintiff-Appellant,	DC# CV-98-05939-R Central California (Los Angeles)
V.	**ORDER**
UNITED STATES AIR FORCE; UNITED STATES OF AMERICA,	
Defendants-Appellees	

Before: GOODWIN, KOZINSKI and LEAVY, Circuit Judges

The panel has voted to deny appellant's petition for rehearing, Judge Kozinski has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and Leavy so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P, 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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